

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion into the Operations and Practices of the Conlin-Strawberry Water Co. Inc. (U-177-W), and its Owner/Operator, Danny T. Conlin; Notice of Opportunity for Hearing; and Order to Show Cause Why the Commission Should Not Petition the Superior Court for a Receiver to Assume Possession and Operation of the Conlin-Strawberry Water Co. Inc. pursuant to the California Public Utilities Code Section 855.

Investigation 03-10-038
(Filed October 16, 2003)

**ADMINISTRATIVE LAW JUDGE'S RULING ON
WATER DIVISION'S MOTIONS FOR SANCTIONS**

The Water Division has filed two motions for sanctions against the Conlin-Strawberry Water Co., Inc., and Danny T. Conlin, its owner and operator (jointly referred to as "Respondents"). The first motion (May 18, 2004) seeks sanctions for Respondents' alleged failure to comply with the Assigned Administrative Law Judge's (ALJ) ruling of May 7, 2004, requiring the disclosure of certain employee information, tax returns, and Mr. Conlin's whereabouts during 2001-2003. This motion was hearing on September 2, 2004.

The second motion seeks sanctions for Respondents' alleged failure to provide certain data from bookkeeping accounts and customer information. This second motion was orally made and heard also during a hearing on September 2, 2004, and later presented in a written motion filed on September 16, 2004. The Water Division seeks monetary and issue sanctions.

The imposition of issue sanctions would preclude Respondents from contesting certain issues framed in this proceeding. Respondents have responded to both motions and Respondents' attorney participated in the September 2, 2004, hearing.

First Motion (May 18, 2004)

First, the Water Division seeks sanctions for Mr. Conlin's failure to explain his work in Southern California or elsewhere from January 1, 2001, through December 31, 2003. This information could reasonably have lead to admissible evidence as to whether Mr. Conlin was impermissibly involved in utility operations (in contravention of prior Commission orders) or had effectively abandoned the utility. Mr. Conlin provided only some logging tickets indicating that he had been engaged in logging. Mr. Conlin failed to provide even a basic chronology of his general whereabouts during the years in question. While he argues that the Water Division was pursuing two contradictory legal theories, the division was only seeking information during discovery and, depending on the information provided, could thereafter pursue the appropriate legal argument. Although Mr. Conlin's deposition was later taken, the earlier provision of this information may well have assisted the Water Division in questioning Mr. Conlin.

In this respect, I find that Mr. Conlin has failed to adequately comply with the ALJ's May 7, 2004, ruling. The Water Division has submitted a proposed ruling requesting two alternative issue sanctions for Mr. Conlin's failure to explain his work during the period described above. One issue sanction leads to the determination that Mr. Conlin actually or effectively abandoned the water company. The alternative issue sanctions leads to the determination that Mr. Conlin violated or has been unresponsive to Commission orders by failing to

sever his active involvement in the water company. I find that the former determination is supported by the weight of other evidence admitted at trial. Consequently, I will sanction Mr. Conlin by imposing the issue sanction concerning abandonment. I reserve any monetary sanction for the Presiding Officer's Decision.

Second, the Water Division asks for sanctions for Respondents' failure to provide copies of corporate state and federal tax returns for the years 1984-2003. For this period, federal tax returns were provided only for five years (1997, 1998, 1999, 2001, 2002) and a state tax return was provided for one year (1997). Respondents indicate that tax returns only have to be retained for seven years. Respondents' corporate 2003 return apparently has not been prepared. Respondents also argue that the state returns would be duplicative of the federal tax information.

Public Utilities Code § 791 indicates that a utility shall keep in its office "all the books, accounts, papers, and records required by the Commission to be kept within this State." In implementing this statutory authority, the Commission's General Order (GO) 28 requires public utilities to permanently retain an extensive list of financial information. The records are to be available so that the Commission may readily examine them at its convenience. The General Order (GO) also indicate that the Commission may authorize the destruction of certain documents. The Commission has done so for Class A, B, and C water utilities by adopting a records retention policy in Resolution A-4691 (July 12, 1977), of which I take official notice. The parties have not directed me to a comparable policy for Class D utilities. I will use Resolution A-4691 to assist my interpretation of GO 28. I conclude that the Commission would not impose a more onerous record retention policy on the smaller Class D utilities.

While tax returns are not specifically mentioned in GO 28, “[a]ll records pertaining to original cost of property and . . . depreciation and replacement of equipment and plant” must be retained; and an utility could not comply with this requirement without retaining tax returns showing this information. Additionally, utility tax returns are a foundational business financial record and fall well within the types of documents that GO 28 requires to be retained. Resolution A-4691 requires that these tax records be retained for seven years “after settlement,” and I conclude that seven years from filing is the appropriate retention period for Respondents’ corporate income tax returns due to the basic importance of these documents.

I find that Respondents have violated Public Utilities Code § 791 and GO 28 by failing to maintain and make readily available to the Commission the federal corporate income tax return for 2000 and the state corporate income tax returns for 1998-2002. The Water Division has asked for a variety of evidence, issue, and monetary sanctions. I will sanction Respondents by imposing the following issue sanction: Audit Issue D(3), as set forth in the Order Instituting Investigation at page 9, is conclusively determined to have been established. Respondents have violated state law (Public Utilities Code § 791) and prior orders of the Commission (GO 28). Any evidence or argument of Respondents to the contrary will be disregarded. I will reserve any monetary sanction for the Presiding Officer’s Decision.

Third, the Water Division seeks sanctions for Respondents’ failure to provide information about past and current employees from September 1996 to the present. In a letter dated May 7, 2003, Respondents provided W-2, W-3 and other information about some of these employees. Respondents indicate that

whatever information is available has been provided to the Water Division and, furthermore, many of the requests (*e.g.*, educational background) are unrelated to the issues of this proceeding.

More information about Respondents' past and present employees could reasonably have led to the discovery of admissible evidence. Some of these employees, if located, may have provided information relevant to these proceedings. The record, however, does not support the conclusion that Respondents have intentionally concealed this information or willfully violated the May 7th ruling. The record does support the conclusion that this information has either been destroyed or cannot be retrieved by Respondents. While this inability to respond may be a technical violation of GO 28, Resolution A-4691 (referred to for guidance) only requires the retention of employee records for three years and payroll records for six years. The record is not persuasive as to what information was not properly retained or that Respondents should be sanctioned for failing to provide more information.

Second Motion

In its second motion, the Water Division seeks sanctions for Respondents' failure to produce work papers for certain accounts (under the Uniform System of Accounts); billing registers for January 1, 1999, to December 31, 2002; and daily receipts allocation information for January 1, 1999, to June 30, 2002.

First, the Water Division alleges that Respondents failed to produce supporting papers for certain bookkeeping accounts for the period of January 1, 1999, through December 31, 2003. The accounts track employee labor, transportation expenses, office services and rental, and general expenses. In its response, Respondents concede that no work papers have been provided because no such work papers exist. Response to Motion for Sanctions at 7

(Sept. 27, 2004). In earlier explanations, Respondents provided a narrative explanation, but no documents, concerning the relationship between the water company and Conlin Logging & Excavating that produced some entries in these bookkeeping accounts. Respondent's Response to Motion to Compel at 3 (May 14, 2004).

Public Utilities Code §§ 791 and 792 authorize the Commission to establish and require a system of accounts for utilities. GO 28 requires utilities to information concerning the corporate accounts. Resolution A-4691 establishes retention periods for various general accounting records that range from three to 50 years. Trial balances are to be retained for three years. Purchase and supply records are to be kept for six years and revenue records generally for ten years. The type of supporting documents that the Water Division seeks certainly should be retained for at least three years, which for this proceeding means from October 2000 (three years before the issuance of the OII). That Respondents are unwilling or unable to provide work papers or other documents supporting these account entries indicates a substantial noncompliance with Public Utilities Code § 791 and GO 28.

The Water Division has asked for a variety of evidence, issue, and monetary sanctions. I will sanction Respondents by imposing the following issue sanction: Audit Issues D(3) & (4), as set forth in the Order Instituting Investigation at page 9, are conclusively determined to have been established. Respondents have violated state law (Public Utilities Code § 791) and prior orders of the Commission (GO 28). Any evidence or argument of Respondents to the contrary will be disregarded. I will reserve any monetary sanction for the Presiding Officer's Decision.

Second, concerning the monthly billing registers, my May 26, 2004, ruling required the disclosure of the documents by May 28, 2004. It is undisputed that Respondents first provided some of these documents on June 1. The Water Division, however, alleges in its motion that, as of September 16, 2004 (the date of the motion), “no billing registers for any type of customers have been given for the period 1999 through 2001, or any other dates in 2002.” Water Division Motion at 3 (Sept. 16, 2004). Respondents response attaches two letters from their attorney to the Water Division, dated June 2 and 3, indicating that billing registers (now denominated as “Customer Data Summary”) were being submitted for all three years.

While Respondents failed to provide billing registers on the date ordered, counsels’ directly contradictory representations make it impossible, based on the existing record, to determine what billing registers were provided. I do not resolve this factual discrepancy; but because of this material discrepancy, I conclude that the Water Division has failed to satisfy its burden of proof. I deny the Water Division’s motion for sanctions concerning the billing registers.

Third, the Water Division seeks sanctions for Respondents’ alleged failure to provide daily receipts allocation information. These documents record the money received from customers on a daily basis. Once again, it is apparent that Respondents failed to provide these documents by May 28, but again there is a factual discrepancy as to what documents were provided within the following days. The Water Division represents that, except for certain dates between July and December 2002, no daily receipt allocation data has been provided. Referring to letters dated June 1, 2, and 3, Respondents explain that, due to computer software changes, daily receipt information for years 1999-2002 is now described as “customer data summary.” The letters indicate that “customer data

summary” for all four years is being submitted to the Water Division. The representations of counsel are again fundamentally at odds. Due to this factual discrepancy, I conclude that the Water Division has failed to satisfy its burden of proof; and I deny the Water Division’s motion for sanctions concerning the daily receipts allocation.

IT IS RULED that:

1. For his failure to adequately comply with the Administrative Law Judge (ALJ) Ruling of May 7, 2004, concerning his whereabouts from January 1, 2001, through December 31, 2003, the following evidentiary and issue sanction is imposed on Danny Conlin: In violation of Public Utilities Code § 855, owner Respondent Danny Conlin has actually or effectively abandoned the Conlin-Strawberry Water Co. Respondent Danny Conlin is hereby precluded from offering any evidence, relying on any evidence already admitted into evidence, or advancing any argument contrary to this determination.

2. For their failure to adequately comply with the ALJ Ruling of May 7, 2004, concerning the production of corporate income tax returns, the following evidentiary and issue sanction is imposed on Respondents: Respondents are conclusively determined to have violated state law (Public Utilities Code § 791) and prior orders of the Commission (General Order 28). Audit Issue D(3), as set forth in the Order Instituting Investigation at page 9, is conclusively determined to have been established. Respondents are hereby precluded from offering any evidence, relying on any evidence already admitted into evidence, or advancing any argument contrary to this determination.

3. For their failure to adequately comply with the ALJ Ruling of May 26, 2004, by producing supporting papers for certain bookkeeping accounts for the period of January 1, 1999, through December 31, 2003, the following

evidentiary and issue sanction is imposed on Respondents: Audit Issues D(3) & (4), as set forth in the Order Instituting Investigation at page 9, are conclusively determined to have been established. Respondents have violated state law (Public Utilities Code § 791) and prior orders of the Commission (GO 28). Respondents are hereby precluded from offering any evidence, relying on any evidence already admitted into evidence, or advancing any argument contrary to this determination.

4. Monetary sanctions will also be imposed. These sanctions will be set forth in the Presiding Officer's Decision at the conclusion of this proceeding.

5. In all other respects, the Water Division's motions are denied.

Dated October 26, 2004, at San Francisco, California.

/s/ John E. Thorson

John E. Thorson
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling on Water Division's Motions for Sanctions on all parties of record in this proceeding or their attorneys of record.

Dated October 26, 2004, at San Francisco, California.

/s/ Antonina V. Swansen

Antonina V. Swansen

N O T I C E

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